COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP2487-CR **Cir. Ct. No. 2005CF705**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GLENN E. FORD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Glenn Ford appeals a judgment convicting him of possessing cocaine with intent to deliver. Through an informant, police arranged to sell Ford one ounce of cocaine and arrested him when he took possession. Ford argues: (1) based on his assertion that he thought he was buying one ounce of

marijuana, the jury should have been instructed that his knowledge of the nature of the controlled substance was a factor to consider when determining intent to deliver; (2) the trial court improperly prohibited him from arguing to the jury that it should consider his knowledge of the substance when determining intent to deliver; (3) the prosecutor inserted improper "testimony" and personal opinion in his closing argument; and (4) this court should grant a new trial in the interest of justice. We affirm the judgment because the first three issues were not properly preserved for appeal, the evidence does not support Ford's claim that he thought he was purchasing marijuana, the trial court did not prohibit Ford from making that argument to the jury, the prosecutor's closing argument constituted permissible and reasonable comment on the evidence, and there is no basis for granting a new trial in the interest of justice.

¶2 After James Welch was arrested on drug charges, he told police about transactions he had with Ford. In a series of telephone calls, Ford told Welch people were "hitting on him to go snowing" and, when asked how big a snowmobile he wanted, Ford responded "a Wizard of Oz." Several prosecution witnesses testified that references to "snow" meant references to a white powder and a "Wizard of Oz" referred to one ounce.

¶3 Welch's wife, Nadine Welch, wearing a wire to record the transaction, delivered the cocaine to Ford in a plastic bag inside a paper bag. She testified that Ford looked in the bag and then closed it. The recording of the transaction does not show that Ford expressed any surprise at its contents. Ford gave Nadine $300, which was consistent with the agreed upon price, as this was a credit transaction in which Welch "fronted" some drugs with the understanding that Ford would pay him later. Prosecution witnesses testified that one ounce of marijuana would sell for approximately $100.

¶4 Although Ford did not testify, his cross-examination of prosecution witnesses suggested that he believed he was purchasing one ounce of marijuana. At the jury instruction conference, Ford objected to the instruction on the third element of possession with intent to deliver, that the only knowledge the State must prove is the defendant's knowledge or belief that the substance was a controlled or prohibited substance, and the State is not required to prove which controlled substance he thought he possessed. That instruction is consistent with ***State v. Sartin***, 200 Wis. 2d 47, 61, 546 N.W.2d 449 (1996). Based on ***Sartin***, the court also ruled that defense counsel would not be allowed to argue that point because it would be contrary to the law. Ford's counsel did not raise any objection or offer any alternative instruction regarding the fourth element, Ford's intent to deliver the controlled substance.

¶5 Ford's argument on appeal regarding the fourth element was not properly preserved. For the first time on appeal, he argues that ***Sartin*** does not prohibit consideration of Ford's belief that he was purchasing marijuana when determining his intent to resell the substance. To preserve the issue for appeal, WIS. STAT. § 805.13(3) (2005-06) requires objection to the proposed instruction, stating grounds for objection with particularity. Failure to object at the conference constitutes a waiver of the proposed instructions. ***Id.*** In order to preserve an objection for appeal, a party is required to make the objection in the trial court on the same grounds that are alleged on appeal. *See* ***State v. Waites***, 158 Wis. 2d 376, 390, 462 N.W.2d 206 (1990). Ford's argument on appeal regarding the fourth element was not preserved by his challenge to the instruction on the third element. Because the issue was not properly preserved for appeal, this court lacks authority to grant any relief on that issue. *See* ***State v. Schumacher***, 144 Wis. 2d 388, 391, 424 N.W.2d 672 (1988).

¶6 Ford argues that the trial court improperly prohibited his counsel from arguing that Ford's belief he purchased marijuana affects his intent to deliver. This argument mischaracterizes the court's ruling. The court only prohibited counsel from arguing as to the third element that Ford did not know the nature of the controlled substance. Ford never attempted to argue that his knowledge of the nature of the substance could be considered when determining whether he intended to resell it.

¶7 As to both of Ford's arguments regarding his knowledge that the controlled substance was cocaine, overwhelming evidence belies his contention that he thought it was marijuana. The telephone discussions for purchase and delivery, the price he paid and the absence of any comment when he looked in the bag refute any belief that he believed he was purchasing marijuana.

¶8 In his closing argument, Ford's counsel noted that the police did not find a scale, baggies, large amounts of cash, or a cell phone or phone numbers in Ford's possession or in his car at the time he was arrested. In the prosecutor's rebuttal, he responded,

> I wouldn't expect and I sure as heck wouldn't if I were a drug dealer go in the middle of public, buy my drugs where I am on tape saying the heat's all around here and sit there weighing out my drugs and putting it into tiny little baggies. I would take my drugs home and bag it up.

Ford describes the prosecutor's rebuttal argument as "testimony" as to what he would have done and an improper expression of his personal opinion on the merits of the case, inviting the jury to add the prosecutor's opinion to the evidence. This argument fails for two reasons. First, Ford did not object to the prosecutor's argument. Therefore, the issue was not properly preserved. *See* ***State v. Guzman***, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717. The prosecutor's

comments do not qualify as "plain error," that is, an error so obvious, substantial or grave that a new trial or other relief must be granted. *See* ***State v. Street***, 202 Wis. 2d 533, 551-52, 551 N.W.2d 830 (Ct. App. 1996). Second, the prosecutor's comments were not in error, much less plain error. He was simply responding to the defense arguments and asking the jury to utilize common sense when determining whether a person purchasing drugs in a public area would bring along materials for repackaging the substance.

¶9 Ford's argument that he is entitled to a new trial in the interest of justice does not clearly distinguish between a claim that the real controversy was not fully tried and a claim that justice has for any reason miscarried. Separate criteria exists for analyzing these distinct arguments. *See* ***State v. Wyss***, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985). A claim that the real controversy was not fully tried includes claims that the jury was not given an opportunity to hear important testimony or that the jury had before it testimony or evidence that had not been properly admitted and that obscured a crucial issue and prevented the real controversy from being tried. ***Id.*** In this case, the real controversy was fully and fairly tried, and Ford does not identify erroneously excluded evidence or improperly admitted evidence.

¶10 Discretionary reversal because of a miscarriage of justice is allowed only if there is a substantial probability that a different result would be likely on retrial. ***Wyss***, 124 Wis. 2d at 741. Because overwhelming evidence establishes that Ford knew the substance was cocaine and intent to deliver can be inferred from the amount of cocaine he purchased and the telephone conversations, it is unlikely that retrial would result in a different verdict.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).